ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of America Online, Inc.	)	File No. 00-30
and Time Warner Inc. for	)	
Transfers of Control	)	
	)	
	)	
To: Chief, Cable Services Bureau	)	

RESPONSE OF
RCN TELECOM SERVICES, INC.
TO
EX PARTE FILINGS

RCN Telecom Services, Inc. ("RCN") hereby responds to a variety of submissions in the above-captioned matter. On April 26, 2000, RCN timely filed a Petition to Condition Merger ("Petition") in which RCN sought the imposition of a program access condition on the grant of the proposed merger of AOL and Time Warner. RCN also filed Reply Comments on May 11, 2000. Since the original deadline for the filing of formal pleadings, numerous other submissions have been made, including a variety of ex parte filings by the applicants and outside parties. Among these is a written ex parte filing of the Walt Disney Company ("Disney"), filed on July 25, 2000. In view of the large number of such filings and the volume of material that has been filed following the close of the initial pleading schedule, RCN wishes to briefly respond to the recently filed views of others. Specifically, it supports the views in Disney's submission.

In its initial Petition and Reply Comments, RCN noted that the combination of AOL and Time Warner raises very serious public interest issues based on the size and respective market dominance of the two applicants, AOL in the Internet market, and Time Warner in the cable and

programming markets.[1] AOL's dominance in the Internet market is massive, with some 23 million subscribers. Time Warner is the second largest cable MSO in the country, with approximately 13 million subscribers, and is the largest distributor of cable programming in the U.S., with more than 40 percent of the market.[2] Time Warner's dominance of the cable programming market is so great that the FTC found it necessary to condition its merger with Turner Broadcasting.[3] Indeed, the applicants themselves acknowledge publicly, albeit for some reason not in their FCC filings, that they are serving 100 million subscribers.[4]

As a cable overbuilder RCN noted that access to high quality programming is crucial if it is to succeed in the uphill battle to build out a competitive cable network and to induce the incumbent's subscribers to switch to the newcomer. Access to programming is a major concern to RCN because it has had difficulties securing rights to carry vertically integrated programming and accordingly sought a condition on the merger that Time Warner agree to make its programming available to all its MVPD competitors on a nondiscriminatory basis without reference to the limited interpretation of the program access provision of Title VI which the Cable Services Bureau has adopted. That is, whereas the Bureau has held that sec. 628 of the Act does not apply to terrestrially-delivered programming, RCN asked that the merger be conditioned on the applicants' agreement to make their programming available to competitors without

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[1] This dominance is briefly set forth in RCN's Reply comments at 2-5.

[2] *See, in general,* Supplemental Information filed by the Applicants at 7-15, and Time Warner's Web page at http://www.timewarner.com, which provides extensive detail on Time Warner's massive holdings in cable networks, cable systems and other media-related activities.

[3] In re *Time Warner, Inc.*, Analysis of Proposed Consent Order to Aid Public Comment, Docket No. C-3709, at 3-4 (FTC Feb. 3, 1997).

[4]. *See* AOL/Time Warner SEC Form 425 filed April 3, 2000, at 1; Time Warner Annual Report, at 43.

reference to the mode of distribution of the programming.[5] Disney's subsequent ex parte filing asks the Commission to condition the merger on a full separation of the facilities and the content of the merged entity. Failing that, Disney urges the Commission to impose anti-discrimination conditions on the merger patterned after sec. 628 of the Act.[6] RCN shares Disney's concerns about the effects of the proposed merger on the programming marketplace, and endorses Disney's recommendations. Disney's views, of course, are those of a program producer whereas RCN is a consumer of programming services on its cable systems. Accordingly, RCN's concerns are for the potential loss of access to Time Warner's programming, rather than, as in Disney's circumstances, the potential loss of markets for its programming. In either case, however, the underlying concern is that the merger, if not conditioned by the Commission, is likely to lead to the formation of a colossus which will have monopoly power, and will exercise that power to preserve and enhance its dominant status in the Internet/information/programming markets.

Moreover, from both perspectives Time Warner's history of anticompetitive activity is relevant to any assessment of the need for competition-enhancing conditions on the merger. In its filing Disney recites instances in which Time Warner has displayed a corporate proclivity to oppose competitive entry.[7] RCN, which competes with Time Warner in the Manhattan MVPD market, and competed with Time Warner in the Boston-area MVPD market, knows only too well how tenaciously Time Warner fights to delay or diminish competitive entry. [8]

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[5] RCN Petition at 11-12.

[6] Disney Ex parte filing, at 66-80.

[7] *Id.*, at 38.

[8] RCN Reply Comments at 9-10.

RCN accordingly supports Disney's request that the merger be conditioned on a separation of facilities and content or, failing that, a broad program access condition be imposed on the parties. In their July 17th response to a staff letter, the parties have indicated that "[even in markets where we have cable distribution, we'll continue to work with other companies of other technologies and give consumers as many choices as possible... [W]e believe that is going to be important as we really reach out to the mass market. We need to give them multiple broadband options wherever possible."[9] The Commission should insist that this concept be reduced to specific commitments which become conditions precedent to approval of the merger.

Similarly, in a letter to Disney, Time Warner, through its President, Richard D. Parsons, has at least tentatively agreed to an affirmative pledge to provide a variety of choices to consumers:

> We pledge ourselves to helping ensure that consumers have a broad range of choices from as diverse an ensemble of content providers as technology makes possible. The criteria we use for offering these choices–and the only ones that consumers will settle for–must always be quality and originality, not corporate ownership.[10]

Unless such language is simply empty rhetoric, propounded to smooth the regulatory gears at the FCC and the FTC, RCN suggests that it can be the basis for a condition by which the applicants agree to make their programming available to MVPD competitors so that the public can have the fullest access to content irrespective of the corporate ownership of the programming or of the competitors.

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[9] Letter of applicants, July 17, 2000, at 11.

[10] Letter of Richard D. Parsons, President, Time Warner, to Robert Iger, President, the Walt Disney company, dated June 15, 2000, at 2, submitted to the Commission as an attachment to an ex parte filing of Disney dated July 11, 2000.

In a letter reporting an ex parte contact at the Commission, Time Warner's counsel indicates that Time Warner does not own regional local sports networks.[11] This may well be the case, but it does not eliminate the issue. While RCN has experienced substantial difficulties getting regional sports programming from more than one MSO, the broader question is whether it is sound public policy to allow two entities which are respectively so dominant in their industries to converge as proposed, and to be able to deny their competitors access to any vital programming to which they have exclusive rights.[12] What is required in the context of the merger application is the promulgation of forward-looking conditions which are responsive to public interest issues, both those which exist and those which the expert agency can reasonably anticipate. Given its dominance in the production of cable programming, Time Warner should be required, as a condition of the merger, to agree even before a problem arises not to withhold competitively vital programming from its MVPD competitors. This is sound public policy as a general proposition; not to do so would be, in RCN's view a serious dereliction of the Commission's responsibilities under the Communications Act. It is especially crucial here because Time Warner has demonstrated repeatedly that it is fully capable of misusing its market power and economic muscle to inhibit competition.

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[11] Ex Parte letter of Fleischman and Walsh, dated July 12, 2000, at 5.

[12] Time Warner proudly touts its local news programming in the New York City area. *Id.*, at 3-4. RCN has not sought access to such programming because local news is, by definition, widely and freely available to any entrepreneur willing to collect, produce, and present it. No one, not even Time Warner, can lock up access to the components of a daily news program. However, when a locally dominant MSO such as Comcast in Philadelphia secures exclusive rights to the great bulk of regional sports programming, as it has done, and then refuses to make it available to its competitors, a serious problem arises.

In short, RCN strongly supports Disney's request that the Commission require, as a condition of the merger, that the content of the merged entity's programming be separated from the conduit through which it is offered to the public. Failing that, the Commission should establish rules to assure that other MVPD competitors have nondiscriminatory access to the merged entity's programming and that other programmers have fair access to the distribution capabilities of the merged entity.

To do less is to expose the American public to the danger, indeed the likelihood, that an enormous portion of the programming produced in this country will not be available to the entire public. The burden of proof with respect to the question whether the proposed merger, on balance, will serve the public interest lies on the Applicants.[13] Given the public's increasing reliance on the mass media for news and entertainment, and on the Internet for all sorts of news and information, the Commission must resolve any doubts in favor of firm commitments from the applicants to a full and free programming and information market. Diversity of programming and programming sources is not only an important element of Title VI of the Communications Act,[14] it is a fundamental and irreducible substrate of American democracy. In this context it is worth repeating that the proposed merger may be the most significant in the Commission's 67 year history of regulation. Demonstrating the crucial importance of the proposed merger is no more difficult than quoting from Time Warner's own 1999 annual report:

> The planned merger of Time Warner and America Online is a development of global importance, universally recognized as the start of a new era in global media. AOL Time Warner will be the

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[13] *See In Re Applications of Ameritech Corp; Transferor, and SBC Communications Inc., Transferee*, FCC 99-279 *rel.* Oct. 8, 1999, at ¶ 48 and cases cited therein.

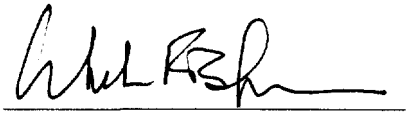
[14] Statutory references are set forth in RCN's Reply Comments at 7.

> first company fully prepared to compete in the borderless world of digital interactivity.[15]

In the same vein, it is noteworthy that in its 1999 Fact Book, Time Warner proudly quotes from one of the company's principal progenitors, Henry Luce, who wrote that the company was formed "in the public interest as well as the interests of shareholders."[16] And Time Warner's current Chairman and CEO, Gerald Levin, has noted that the company has set for itself the goal "to be the formative leader in ensuring that the central medium of our age is a tool for expanding people's freedom, empowering their minds and enhancing their enjoyment... ."[17] Such lofty rhetoric should be reduced to practical and enforceable commitments. Absent a clear, unequivocal commitment from the merger applicants to make their programming available to competitive MVPDs and to make their distribution facilities available to other programmers, the Commission must impose such obligations on the merger applicants as a condition of its approval.

Respectfully submitted,

RCN TELECOM SERVICES, INC.

By: 

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August 11, 2000

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[15] Time Warner Annual Report, at 7.

[16] Time Warner, 1999 Factbook, at 16.

[17] Time Warner, Annual Report, at 5.

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2000, a copy of the foregoing RESPONSE OF RCN TELECOM SERVICES, INC. TO EX PARTE FILINGS was served on the following parties via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

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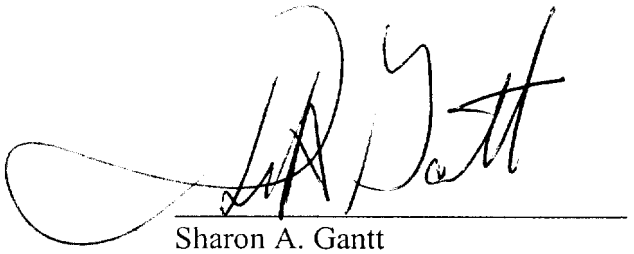

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